No. 15689

United States
COURT OF APPEALS
for the Ninth Circuit

HELEN A. DAVENPORT,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

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Introduction

The Government's Brief makes no attempt to come to grips with the propositions advanced in appellant's brief. It sets forth the indictment, but does not comment upon the actual allegations of fact it contains. The Government avoids altogether, either in argument or propositions of law, answering that which appellant charges as a basic flaw; that the only allegations of fact appear in the first paragraph of the first substantive count where they are charged as the acts of appellant's

co-defendants, with the obvious result that when these allegations are incorporated into the conspiracy count as its allegations of fact, the Government intends to prove appellant's crime by the deeds of her co-defendants.

Whether consciously or not, the Government's brief is a bold use of an old technique of debate: If you can think of no real answer to an argument advanced by your opponent, ignore the point and shift the controversy to some other ground. Of all the cases cited by appellant, for example, and though the number of cases cited by the Government is nearly half again as many, the Government comments upon only two of them, *Nigro v. U.S.,* 170 Fed. 2d 624; and *Walker v. U.S.,* 93 Fed. 2d 383, and these only in a footnote and in connection with appellant's Assignment of Error No. V, that it was error for the trial court to inform the jury that the defendants Errion and Montgomery had pleaded guilty.

Upon page 38 of its brief the Government states:

> "It is difficut to ascertain the exact nature of appellant's complaint with respect to the Government's indictment."

Appellant has carefully reviewed the contents of her opening brief. She has concluded that she need not consent to being labelled incoherent. Further, from the contents of the Government's brief, it would seem that the Government has not really had any difficulty in ascertaining the exact nature of appellant's complaint; it has only been at a loss to ascertain an answer to it.

The Government's re-arrangement of the order of appellant's points is far too obvious. The effort to concentrate upon the evidence and ignore the allegations of fact under which it was adduced is patent.

Let us keep clearly in mind that Paragraph I of Count I charges the defendants Errion, Munkers, Wright, Bones, Locke, Montgomery and Martin with having devised and intended to devise a scheme and artifice to defraud and that each and every allegation of the description of that scheme are described as the acts and deeds of these defendants alone. These defendants alone are charged with control of the Davenport Corporation, and in this indictment, none others; they alone are charged with having caused it to enter into a contract with Mt. Hood by means of which they converted a large portion of the moneys received for memberships to their use; they alone are charged with having used it to resell to the cooperative at a profit to themselves, real property purchased in the first instance with the cooperative's own money and through its own personnel.

Helen A. Davenport is not mentioned.

Let us abide by these allegations of fact and not insert therein that these defendants "together with one Helen A. Davenport" devised this scheme, or that these defendants "together with one Helen A. Davenport" caused the Davenport Corporation to enter into this contract, etc.

With this reminder, we can quickly appraise the

merit of the Government's brief by considering the language of its various headings.

I.

The Government's first argument is titled; "The evidence clearly established a scheme to defraud and fraud in the sale of securities and appellant's willful participation in a conspiracy to commit those crimes."

Patently, any evidence adduced to establish a scheme to defraud and fraud in the sale of securities was adduced under the allegations of the substantive counts, there being no other allegations of fact in the indictment. This scheme is not appellant's scheme, nor is this fraud appellant's fraud, for those allegations make no mention of appellant.

The Government's assertion that the evidence established appellant's willful "participation in a conspiracy to commit those crimes," is a mere rhetorical flourish. It is without any foundation whatsoever when the evidence is viewed in the light of the allegations of fact under which it was adduced and which it was intended to prove.

The subdivisions of this argument, the steps by which the Government intends to establish the foregoing, are as follows:

Subdivision A is that the "substantive offenses" were conclusively proven. Assuming that they were, all that has been proven is that appellant's co-defendants were guilty of the crimes charged against them in the substantive counts.

But let appellant emphasize what the Government desires to establish here as its first link in the chain of *her* guilt: That Errion, Munkers, Wright, Bones, Locke, Montgomery and Martin are guilty of *their* crimes as charged in the substantive counts.

But note what occurs next. Since the Government has been unable to start with the assertion that *appellant's* participation in the substantive offenses was conclusively proven, the acts constituting participation in a "conspiracy" must be made to appear to be acts altogether different than acts constituting participation in a joint substantive offense.

Thus, Subdivision B of the Government's argument is that appellant's "participation in the *conspiracy* to commit the substantive crimes was established by the evidence."*

The "conspiracy" of which the Government speaks is patently not the "conspiracy" of which the law speaks. The conspiracy of which the latter speaks is a partnership in criminal purpose. By definition, agreeing to participate in a substantive offense is the subject matter of its conspiracy agreement and an inference can be drawn that an accused has participated in such

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* How much more harmonious with the law, but not the facts, would have been the assertion that appellant's participation in the *substantive crimes* was sufficient to establish her participation in a conspiracy! Amongst the many other propositions advanced in appellant's brief and ignored by the Government is that this is very clearly the fashion in which the jury was to infer the guilt of appellant's co-defendants of the conspiracy count—and that by virtue of the nature of the evidence this was the *only* fashion in which guilt of this count was to be established in this cause.

an agreement from proof that he has participated in a joint substantive crime.

It is self-evident that the fact that appellant was neither charged as an accused in the substantive counts nor named as an actor in the body of those counts, was an insuperable obstacle to her conviction upon the conspiracy count under the theory upon which this latter count was prosecuted in this cause. It prevented an inference of her participation in a conspiracy agreement being drawn from such proof.

It is obvious that we are now chasing a will-of-the-wisp, but turn to Subdivision 1 of Part B of the Government's argument to see how far afield we are drawn. This subdivision is labelled; "Background of appellant's association with Errion." The Government seeks to establish, as its second link (the first was that her co-defendants were guilty of their crimes), that appellant knew or should have known from past association with Errion that the man was a swindler. As it set forth earlier; "as the evidence in the record will show, appellant well knew Errion's evil reputation," (Government's Brief, page 15). Or, as appellant herself has stated in her own brief, she was included as an accused in this cause because of what she should have known about Errion, and not because any proof existed that she had knowledge of his particular scheme.

And note this, as characteristic of the "case" against appellant: while what appellant should have known of the character of Errion from her past contact with the man is the first argument that comes to the Govern-

ment's lips, the evidence adduced of her past contact with him only appears in her own testimony in her "defense." Note the references to the Transcript in this portion of the Government's brief. They are all to appellant's own testimony and none are to the Government's case in chief.* As appellant has pointed out in her brief, in its case in chief the Government only sought to prove the allegations of the substantive counts. Appellant's 'prosecution" under the conspiracy count never began until after the Government rested! Witness now how the Government advances as the first step in its case against appellant, after the guilt of her co-defendants, evidence that was not received in the cause until after that time. Appellant's "prosecution" thus consisted of nothing more nor less than of questioning appellant to see whether or not in hindsight the allegations of the substantive counts, already proven in one fashion (as alleged) should have been worded differently so as to have included, and not excluded, blame upon appellant for the wrongdoing described therein.

Now note subdivision 2 of this argument. It is headed "Participation by Appellant and Davenport Corporation in the Mt. Hood Scheme." What can be considered under such a heading other than the use of appellant and/or the Davenport Corporation (which, by the way, is not a named defendant) in the scheme set forth in the substantive counts so as to ascertain whether or not the allegations of fact set forth in those

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* And what was that "past contact"? Errion mulcted her of an unstated amount in the "oyster bed *fiasco*," and of $30,000.00 on the "Duniway judgment" (Government Brief, page 18).

counts have been proven against the defendants charged therein?

Let us note some of the details of evidence seized upon by the Government to see how true this has to be. The Government makes reference to a "steady concealment of his (Errion's) identity with this promotion." The charge that the Davenport Corporation was used as a cloak to hide Errion's connection with this enterprise is hindsight only. When the S.E.C. began investigating Errion's connection with this venture, any step that might possibly have had the effect of separating him from it became suspect as having been taken by him for just that purpose. It is impossible, however, to judge this man's conduct by the standards of a rational person. That he thought of the Davenport Corporation as a means of secrecy, is contradicted by the fact that at all times he dealt openly and for himself with reputable counsel (of whom anyone could have made inquiry), the incorporators, and the directors and management of the cooperative after it had organized itself from among its membership.

Consider the matter of copyright imprint. This was something done by Errion solely to gull appellant. Note how appellant speaks of them; she not only assumes that they had value, but that their value will be immediately apparent to her listeners at this trial (Tr. 1283-1430). Examine the material itself and it is obvious that these copyrights were worthless. What isn't in public domain can be equalled by any competent advertising firm!

Does the Government seriously contend that although salesmen of the Forest Products Company were selling these memberships by personal contact with prospective purchasers, that the latter might have desired to withdraw into a corner to search for the copyright imprint on this printed material and have elected to believe that whoever copyrighted it, was behind its representations? Does the Government seriously contend that this imprint would conjure up to a total stranger to appellant and her corporation *her* image, identity and standing in the community, as against the image of a printing firm headed by a man named Davenport, or located in Davenport, Iowa? There is not the slightest evidence whatsoever that appellant's name or standing was ever used to influence prospective members to buy these memberships, let alone evidence that these copyright imprints were ever explained towards that end to a prospective member.

Upon page 26 of its brief, the Government sums up a number of items of evidence as "also illuminating of appellant's relationship to co-conspirators Errion, Locke and Munkers." Under the actual allegations of fact of the substantive counts, they are equally illuminating of the relationship of Errion, Locke and Munkers to appellant, when considering whether or not these allegations have been proven against them.

Upon this same page the Government states, "Her testimony regarding this transaction gives the lie to her pretense that her interest in Davenport Corporation bank account was merely a clerical one for the convenience of Errion." Upon what basis does the Government

use such language? It is the Government's own allegation of fact that the Davenport Corporation had only a clerical interest in the moneys swindled from the members by the defendants charged in the substantive counts.

The Government here spends a number of pages of its brief arguing contrary to its own allegations of fact as proven by the testimony of its witnesses Piatt and Samuels in its case in chief; i.e., it queries whether or not those it has charged with criminal responsibility for the acts of the Davenport Corporation in its substantive counts are the only ones that should have been charged with criminal responsibility for its acts. This question may intrigue the Government, but it is outside the allegations of fact of its indictment.

The Government's brief then takes up the resale of the plant site to the cooperative. Upon page 38 the Government states that "the use of the Davenport Corporation to siphon off the Mt. Hood investors' funds by taking secret profits on real estate deals . . . was an important feature of the fraudulent scheme in this case and could not have been accomplished without the direct participation of Mrs. Davenport." Which, of course, is only a repetition of what is stated in the allegations of the substantive counts: That the defendants charged therein used the Davenport Corporation (which, of course, couldn't act except through some human agency —its officers) to effect this resale for purposes of making a profit for themselves.

The Government then recites the details of this

transaction which are precisely suited to the finding that the defendants charged in the substantive counts are guilty under the allegations of fact charged against them.

The Government concludes this recital by stating that "the testimony of appellant as to her knowledge of this unconscionable deal rings neither true nor plausible." Apparently, appellant's conviction is to be sustained, not upon the evidence adduced in the prosecution's case in chief to prove the allegations of fact of the indictment, but upon the basis that the jury was free to reject her explanation, given after the Government rested, that she was innocent of the crimes of her co-defendants described therein!

Under Subdivision C the Government argues that appellant's guilt or innocence was properly submitted to the jury. The Government first challenges the contention set forth in appellant's brief that direct evidence of actual knowledge of the fraud is the least evidence that will support an inference of an agreement to participate in the same upon the part of any given defendant. The context of this statement is appellant's assertion that the overall evidence was probably insufficient to submit the conspiracy count as to any but the defendant Munkers. Appellant first voices this point upon page 48 of her brief where she points out that the evidence in this cause was different than that usually observed in such cases. In her opinion there was nothing susceptible of the interpretation of being direct evidence that any of the alleged co-conspirators, other than Munkers, knew of their own knowledge that the specific misrepresenta-

tions set forth in the indictment were in fact false. None of the alleged co-conspirators took the stand to admit this or to level the same accusation against another accused. Appellant pointed out the distinction between a conspiracy whose subject matter, for example, was the handling of proscribed alcoholic beverage, creating an unlawful overt act upon the part of each person who dealt with it, and a conspiracy whose subject matter was fraud where each person who might make the statement that was in fact false, need not have actual knowledge of its falsity and, if they did not, could not have shared such knowledge with another.

In this light, none of the cases cited by the Government contradict appellant. In *Blumenthal v. U. S.,* 158 Fed. 2d 883, 9th Circuit 1946, Affirmed 332 U.S. 539 (Government's Brief, page 32), the accused sold liquor at prices in excess of the ceiling set by the Office of the Price Administrator, in itself an unlawful overt act.

In *Levine v. U. S.,* 79 Fed. 2d 364, 9th Circuit, 1935 (Government's Brief, page 33), Levine was a salesman in a scheme to sell worthless oil stock. Upon page 366 this Court states that Levine "knew perfectly well the stock was worthless," and outlines how, in selling it, he would first solicit customers for a purchase of General Motors Stock at far below market price, then state that that stock was not available and switch them to this worthless stock, sometimes without the customer's consent.

In *Allen v. U. S.,* 4 Fed. 2d 688, 7th Circuit 1924 (Government's Brief, page 33), the charge was a con-

spiracy to violate the National Prohibition Act and each of the accused dealt with obviously illegal goods. In *Pereira v. U. S.,* 347 U.S. 1 (Government's Brief, page 33), the two accused both made representations, proven false of their own knowledge, to induce their victim to purchase fictitious property.

In *Van Riper v. U. S.,* 13 Fed. 2d 961, 2r Circuit 1926 (Government's Brief, page 35), the accused was likewise proven to have made false statements, false of his own knowledge. The following is omitted from the Government's citation:

> "His defense is that he was not aware of what was said in the circulars which went out from 15 Moore Street. It was on his first letter to Hedrick that the first circulars were issued, containing the false statement about casing in the 50 barrel well, and on his return he saw and talked with Hedrick. He was at times at the office at 15 Moore Street and attended some meetings there."

This sentence appears after the close of the Government's citation:

> "In the case at bar his proven misstatements about the Wyoming well no doubt went far to overthrow his story, but in any case the issue is not for us."

In *Seeman v. U. S.,* 96 Fed. 2d 732, 5th Circuit 1938 (Government's Brief, page 36), the charges concern shipping forged bonds in interstate commerce. The appellant received a wire from an accomplice sending him some money and asking him to "ship immediately." Appellant pocketed the money and thereafter one Fein shipped the forged bonds. On his arrest the appellant

denied receiving the telegram or the money or that he even knew the others. When the contrary was proven, he then sought to explain the money as a payment upon a debt due him. The Government's citation is the Court's comment upon this circumstance.

What appellant had to say in her opening brief, she still maintains. The specific misrepresentations are alleged in the indictment. It is one thing to draw an inference that the defendant Munkers had knowledge of an agreement to perpetrate a fraud and agreed to participate therein from direct evidence of his knowledge of the falsity of his statement to the witness Jack that he knew the signature upon the letter purporting to come from the "syndicate" was genuine. This is direct evidence of his knowledge of the falsity of the alleged representations comparable to the evidence adduced in the cases hereinabove cited. It is another thing, however, to attempt to jump to the same inference from the fact that an accused made a representation that financing existed, in fact false, but without further evidence that he knew it to be false of his own knowledge and thus without evidence of his being in a position to share knowledge of its falsity with another and in this fashion to have engaged in a conspiracy with the latter.

In any event, it should be noted that the Government's argument here is to justify the submission of the conspiracy count as to appellant upon the ground that the evidence was sufficient in general when viewed from the position of all of the defendants. There is no effort here to resolve appellant's particular position that is so fully described in appellant's brief.

II.

We come now to the Government's argument that the indictment properly charged appellant with the crime of conspiracy. The argument under this caption, however, makes no effort to substantiate the indictment in view of appellant's criticism.

This argument commences with a statement that the language of Count XIII follows the usual form. Cases are then cited and it is advisable that we consider these to see whether any of them in fact bear upon the particular fashion in which appellant was charged in this indictment.

In *Nemec v. U. S.,* 178 Fed. 2d 656, 9th Circuit 1954 (Government's Brief, page 36), there were three defendants and five counts and the three defendants were charged in all counts. Apparently, since the Government cites this case, reference from one count to the other must have been used. However, had the Government intended to charge one of the accused in the conspiracy count but not in the subsequent substantive counts, they properly had the horse before the cart in this cause, for Count I alleged the conspiracy count and presumably described the same in allegations of fact, and the subsequent counts alleged the substantive offenses.

In *Donaldson v. U. S.,* 248 Fed. 2d 364, 9th Circuit 1957 (Government's Brief, page 36), Donaldson and his father-in-law were charged in ten counts concerning the sale of stock in a holding corporation and subscriptions in a health and accident insurance company. The last count charged conspiracy. The father-in-law died before

trial. Donaldson was found guilty of all counts but the conspiracy count. Upon page 36 this Court states:

> "The indictment charged, in substance, that appellant and C. A. Donaldson, devised a scheme and artifice to defraud in the sale of . . ." etc.

Although the report does not reveal, apparently the Government is aware that reference was used, but if so it is the only analogy of this cause to the instant case.

In *Allen v. U. S.,* 186 Fed. 2d 439, 9th Circuit 1951, Certiorari denied, 341 U.S. 948 (Government's brief, page 36), the report reveals to appellant that there were joint defendants who were apparently charged in all counts. (This Court states the "scheme described was that defendants would and did cause . . ."). Counts I to VI were substantive counts; Counts VII charged conspiracy. There was conviction only upon the latter. Again, apparently the Government is aware that reference was used in this cause, but otherwise it has no analogy to the case at bar.

Walter v. U. S., CCH ¶ 90851, 9 Circuit Apr. 11, 1958, is simply another case in which a conspiracy and substantive counts were joined, and where all defendants were charged in all counts, as appellant reads the report.

The next series of cases appear upon page 39 of the Government's brief. No purpose is served by setting forth the content of the Government's argument at this point; it is a hazard as what appellant might be "suggesting" that follows upon the Government's statement that it has been difficult for it to ascertain the exact na-

ture of appellant's complaint concerning this indictment. Appellant's complaints are clear enough and can be found in her brief. Suffice it to say, therefore, that these cases are cited in support of this point: That even though the substantive count in a mail fraud scheme is defective, it may still serve the purpose of "reference" for a conspiracy count. The Government then cites *U. S. v. Monjar,* 47 Fed. Sup. 421, affirmed 147 Fed. 2d 916, 3rd Circuit, 1944, Certiorari denied 325 U.S. 859. In this cause, the District Court held Count I to be defective for failure to allege that the letter referred to therein was used for the purpose of "executing the alleged scheme and artifice to defraud" (47 Fed. Sup. at page 425). The Court of Appeals, however, sustained the substantive counts upon the ground that the mails need only be used in the course of the scheme and need not be vital to its execution. In view of this, this case seems a little aside the point. However, it should be noted in passing that the District Court properly held that guilt of a conspiracy to use the mails to defraud, does not require success and the actual commission of the substantive offense.

This decision has no bearing on the case at bar.

Touhy v. U. S., 88 Fed. 2d 930, 8th Circuit 1937; *Bell v. U. S.,* 100 Fed. 2d 474, 5th Circuit 1938; *U. S. v. Cohen,* 145 Fed. 2d 82, 2d Circuit 1944, and *Chew v. U. S.,* 9 Fed. 2d 348, the other cases here cited by the Government, stand only for the proposition that in a criminal indictment incorporation by reference can be used to borrow the allegations of fact of one count for

the purpose of supplying the allegations of fact of another.

This, of course, was conceded by appellant upon page 9 of her opening brief, being completely aside from the propositions she wished to advance.

Upon page 40 of its brief the Government seeks to use in its arguments the statement that "the fact that a Grand Jury has not indicted can in no way be construed to indicate that a person may not be guilty."

The Government cites *Alexander v. U. S.*, 95 Fed. 2d 873, 8th Circuit 1938, Certiorari denied, 305 U.S. 637. Here the appellant was indicted for the crime of conspiracy to commit a substantive offense with a group of named co-conspirators. Previously the Grand Jury had indicted those named as his co-conspirators for the crime of conspiracy upon a separate indictment. The appellant contended that not having been included in the previous indictment, the previous indictment was an admission of his innocence. The Court held that it was not. Patently, this cause does not stand for the proposition that the fact that the Grand Jury has not indicted can in no way be construed to indicate that a person is not guilty. It stands for the proposition that one can be indicted in a separate indictment for a joint crime and that one can always be indicted if he hasn't already been indicted. Obviously, until a person is indicted it will not be established whether they are guilty *or* innocent. This is precisely appellant's complaint in the cause at bar. She is not indicted in the substantive counts and therefore they present no issue of fact concerning her. That is

not to say that she could not have been an accused therein, or that she still cannot be accused of the same in a separate indictment. It is only to say that she is not accused of them in this indictment and that it therefore presents no issue of fact as to her.

But let us stop the film at this point, so to speak, and consider just exactly what sort of argument the Government is advancing here. It appears to be that the fact that appellant was not indicted in the substantive counts doesn't mean that she is innocent of the facts of those counts; therefore she can be found guilty of the facts of those counts even though not charged with the same.

Can this really be the Government's argument? Let us run through the Government's own language commencing upon page 39, in slow motion, interpolating, however, to make personal to this case what the Government states as a generality.

> "If appellant's contention is that the indictment is defective on the basis that failure of the Grand Jury to charge her with violation of the substantive counts . . . precludes the *facts* therein from *being used against her* in the conspiracy count, it is based on false assumptions . . . of law. The fact that a Grand Jury has not indicted (her) can in no way be construed to indicate that . . . (she) may not be (found) *guilty* (of those facts without an indictment charging them.)" (Emphasis and parenthetical matter added).

Incredible as the foregoing may sound, appellant believes that it is in fact the Government's only answer to the specific charges appellant has levelled against this

indictment. It consists of a tacit acknowledgment that appellant is not charged with the facts of the substantive counts, a tacit admission that her conviction is based upon her having been found "guilty" of those facts, and the excuse that the lack of an indictment is not impediment to a conviction; it is not an admission by the Government that she is innocent and cannot be construed to indicate that she is not guilty!

* * *

Upon the same page the Government asserts that appellant assumes that an acquittal of the substantive counts would compel an acquittal on the conspiracy count; citing authorities contra here and upon the page succeeding (*Shayne v. U. S.,* 9th Circuit No. 1506, May 10, 1958, and *Coplin v. U. S.,* 88 Fed. 2d 652, 9th Circuit 1957). Appellant has not contended that an acquittal on the substantive counts would compel an acquittal on the conspiracy count. Appellant has in fact, pointed out that the jurisdictions are divided on this rule. (Appellant's Brief, page 35 et seq.). What appellant *has* contended, is that an acquittal upon substantive counts and a conviction upon a conspiracy count is an inconsistent verdict and recognized by all jurisdictions as such, whether they hold that such inconsistency voids the verdict or, as this jurisdiction, hold that it does not.

U. S. v. Cohen, supra, cited upon pages 40-41 of the Government's brief is in any event, a poor example for the Government's argument. The accused had to be acquitted of a substantive count of using the mails to defraud based upon the mailing of a particular letter because the evidence did not show that he was a member

of the conspiracy at the time it was mailed. On the other hand, however, the Court properly held that the charge of conspiracy to use the mails to defraud did not require completion of a substantive offense, nor, in this case, this particular mailing, and the latter conviction was upheld.

These are the cases cited in that portion of the Government's Brief intended to answer appellant's Assignments of Error Nos. I and IA.

The Government makes no comment upon appellant's proposition that she was entitled to be informed of the crime of which she was accused in allegations of fact and ignores the cases cited by appellant showing that neither the allegations of overt acts or the allegations of the acts of alleged co-conspirators, or conclusions of law, can supply such allegations.

Appellant's detailed analysis of this indictment is ignored.

Upon page 39 of its brief the Government states:

> "If appellant is suggesting that the conspiracy count is inadequate in incorporating by reference the *scheme* alleged in Count I merely because appellant is not charged with a violation in Count I, she has mistaken the purpose of incorporation by reference, which is not to charge defendants with the crime alleged in the prior count but only to avoid repeating the description of the *acts* set forth in that count." (Emphasis added).

If it was meant to incorporate the "scheme" alleged in Count I—whose scheme was it? Or to get down to fundamentals, if its purpose was to avoid repeating the

description of the "acts" set forth in the first count—whose acts were they?

They were the scheme and acts of appellant's co-defendants. How can *their* acts either charge appellant with a crime or prove that she committed one?

III.

Whether or not it was an abuse of discretion for the trial court to deny appellant's motion for a separate trial is a question appellant presents. The law is clear; the matter was discretionary and appellant has not stated otherwise. The Court is referred to appellant's opening brief for her views upon this matter.

IV.

We turn now to the Government's answer to appellant's contention concerning the Court's instructions.

The Government asserts that the instructions upon the substantive counts were not prejudicial to appellant since she was only tried upon, and found guilty of, the conspiracy count. A cursory reading of appellant's opening brief, however, reveals that she does not contend that these instructions were prejudicial in this fashion.

Appellant points out both in her Assignment of Error No. IV (page 50) as well as in her Assignment of Error No. II (page 43) that the Court dealt with appellant and the facts by which she was to be judged guilty or innocent of the conspiracy count in its instructions upon the substantive counts. Indeed, the Government has tacitly admitted in its brief that she was in fact tried upon the "facts" of those counts.

The "prejudice" to appellant was that her guilt of the allegations of fact set forth in the substantive counts was not an issue in this cause. Appellant complains that the Court affirmatively submitted to the jury her guilt of the facts alleged against her co-defendants in the substantive counts and not that the Court submitted the guilt of her co-defendants upon such instruction and forgot to except her therefrom. This Court is referred to appellant's remarks upon this point in her opening brief.

V.

We turn now to the Government's answer to appellant's Assignment of Error No. V, that the Court erred in informing the jury that the defendants Errion and Montgomery had pleaded guilty.

In assigning this as error appellant assumed that it would be recognized that the facts of the case at bar were that the defendants Errion and Montgomery had pleaded guilty at a time prior to the trial date and that neither testified. Therefore the following language of *Nigro v. U. S.*, 170 Fed. 2d 624, 8th Circuit at page 632, seemed appropriate:

> "The jury, however, should not be told that the defendants, the Conleys and the Darlings had pleaded guilty, unless they appear as witnesses and testify to their guilt."

In each of the following cases cited by the Government the error assigned was either that the plea was received in the middle of the trial in the presence of the jury, with or without comment upon the plea by the Court, or that the Court commented upon a plea taken outside the presence of the jury, but likewise the ac-

cused whose plea was remarked upon, appeared as a witness and testified: *Nemec v. U. S.*, supra; *U. S. v. Dewinsky,* 41 Fed. Sup. 149, D.C. at N.J. 1941; *Holmes v. U. S.,* 134 Fed. 2d 125, 8th Circuit 1943, Certiorari denied 319 U.S. 776; *U. S. v. Hartenfeld,* 113 Fed. 2d 359, 7th Circuit 1940, Certiorari denied 311 U.S. 647; *U. S. v. Joel Rosenberg,* 146 Fed. Sup. 555, E.D. Pa. 1956; and *U. S. v. Rollnick,* 91 Fed. 2d 911, 2d Circuit 1937.

In the following two cases the plea was taken before the commencement of trial but in the presence of prospective members of the jury panel: *Hines v. U. S.,* 131 Fed. 2d 971, 10th Circuit 1942, and *Grumberg v. U. S.,* 145 Fed. 81, 1st Circuit 1906.

It is interesting to note the language of the court in the *Grumberg* case, supra (apparently the earliest of the cases), where the court states that what transpired was not prejudicial:

> " . . . Because it is impossible to escape the belief that the fact that Burnham had pleaded guilty would come out in the course of the trial, and, also, that it would become a matter of common knowledge about the courtroom, which the entire panel would inevitably be affected by."

Where the accused whose plea has been taken appears and testifies, it is obvious that the court's reference to his plea is inconsequential. Where, as in the Nemec case, supra, an accused changes his plea in the middle of the trial (he also testified in this cause), it is reasonable for a court to explain why an accused who has been at the counsel table will no longer be in attendance at the trial.

In the case at bar, however, there was no such circumstance that needed explanation. The mystery, if any, created by the absence of the defendant Errion was whether he was absent for reasons of innocence or reasons of guilt. The Court's remarks put the jury's mind at ease upon this point; one so palpably guilty had not escaped being brought to heel and "was safely in jail." If the situation required an explanation, it would have been sufficient to state that the cases of the defendants Errion and Montgomery had been disposed of at another time.

As to the prejudice that resulted, the court is referred to appellant's remarks in her opening brief.

Conclusion

Appellant can think of no better way of concluding this reply brief than by borrowing from the Government's conclusion to its answering brief.

On page 51 the Government states, apropos of the contract between the cooperative and the Davenport Corporation:

> "For an experienced business woman to sign a contract of this kind, inviting the investment of common workers to the venture, while at the same time acknowledging that she was told she would have nothing to do under the contract, was a badge of fraud."

The precise language of Count I, Paragraph I that has reference to the execution of this contract is as follows:

> "As a further part of said scheme and artifice, said defendants (Errion, Munkers, Wright, Bones, Locke, Montgomery and Martin) would and did cause said Mt. Hood to enter into a contract with the Davenport Corporation, a corporation controlled by defendants. . . ."

Appellant submits that she needs nothing more than the foregoing allegation to conclusively establish that her motive and intent in executing this contract was not an issue of fact in this cause; that she was never apprised that it would be in issue; and that her conviction based thereupon is in violation of her basic right to be informed aforehand of the crime of which she is accused.

Perhaps now the Government can understand the exact nature of appellant's complaint against this indictment.

Respectfully submitted,

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